

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LINDA J. SMITH, CHARLES L.	:	APPEAL NOS. C-080820
SMITH, JR., SUSAN PERT EARLEY,		C-080864
Trustee, and DANIEL EARLEY,	:	TRIAL NO. A-0509207
Trustee,		
	:	
Plaintiffs-Appellees/Cross-		<i>JUDGMENT ENTRY.</i>
Appellants,	:	
vs.	:	
PRECISION-BUILT CORPORATION,	:	
ANDREW B. THUL, and ANDREW B.		
THUL, Trustee,	:	
Defendants-Appellants/Cross-	:	
Appellees,		
and	:	
MICHAEL L. WEBER and LINDA F.	:	
WEBER,		
	:	
Third-Party Defendants-		
Appellees,	:	
and	:	
ANDY ARGO CONSTRUCTION CO.,	:	
LTD., ET AL.,		
	:	
Defendants.		

We consider these consolidated appeals on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

In the appeal numbered C-080820, defendants-appellants/cross-appellees Precision-Built Corporation and Andrew Thule, both individually and as trustee, (collectively “PBC”) appeal the trial court’s entry of judgment for three pairs of subdivision residents. The residents had brought suit to stop PBC from obtaining access to other parcels of land located outside the subdivision by trespassing on their subdivision properties, and to recover damages resulting from that access.

Plaintiffs-appellees/cross-appellants Linda J. and Charles L. Smith and Linda and Dan Earley (collectively “the Smiths”) own adjacent homes in Lots 8, 10, and 12 of the Rio Grande subdivision overlooking the Ohio River, in Anderson Township, Hamilton County, Ohio. The third pair of residents, third-party defendants-appellees Michael and Linda Weber, owns Lot 14 in the subdivision.

PBC developed the 24-lot subdivision in the 1970s. Thule was the sole owner of PBC and personally signed the plats and the covenants to develop the subdivision. The entire subdivision was built on a steep hillside that has a history of landslides. The recorded subdivision plat included a restriction on grading within the landslide area, including Lot 2, owned by Thule.

Thule owned and wished to develop several parcels of land located between the subdivision and State Route 52. Thule referred to these parcels as “Lot 25” and “Lot 26,” though neither parcel was ever included in the Rio Grande subdivision. Despite the failure to receive the owners’ permission, PBC repeatedly attempted to gain access to these parcels through the Smiths’ and the Webers’ subdivision properties. PBC also constructed a gravel access road through subdivision Lot 2 despite the existing restrictions against any grading and against any construction beyond a single-family home.

Following a lengthy bench trial, the court journalized a five-page set of findings of fact and conclusions of law. And on July 11, 2008, the trial court incorporated those findings of fact and conclusions of law into its judgment entry.

In its first, second, and third assignments of error, PBC contests the trial court's factual findings and its award of damages. PBC argues that the trial court erred (1) in finding that the no-grading restrictions in the subdivision plans constituted a restrictive covenant that prohibited PBC from building a roadway in Lot 2; (2) in finding that PBC had no valid easement of access across Lot 14 to "Lot 25," an adjoining parcel; and (3) in awarding both compensatory and punitive damages, as well as equitable relief, to the Smiths.

An appellate court will not reverse a judgment of the trial court if it is supported by some competent, credible evidence going to all the essential elements of the case or defense.² In reviewing the evidence adduced at trial, an appellate court is bound by the credibility determinations made by the trial court sitting as the trier of fact.³ Every reasonable presumption must be made in favor of the judgment and the trial court's findings of fact.⁴

Here, the trial court made its rulings after an eight-day trial during which it had received the testimony of 12 witnesses, including that of Thule and numerous expert witnesses, and reviewed over 80 exhibits.

There was competent, credible evidence from which the trial court could have concluded that the no-grading restrictions in the subdivision plans constituted a restrictive covenant that prohibited PBC from building a roadway in Lot 2. The trial court found that

² See *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9, 614 N.E.2d 742; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus; see, also, *Stand Energy Corp. v. Cinergy Serv.* (2001), 144 Ohio App.3d 410, 417, 760 N.E.2d 453.

³ See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

⁴ See *Shemo v. Mayfield Heights*, 88 Ohio St.3d 7, 10, 2000-Ohio-258, 722 N.E.2d 1018.

the binding covenants of the recorded subdivision plat prohibited grading in the landslide areas of Lot 2 and limited development to single-family homes. PBC violated these restrictions when it constructed a gravel access road in Lot 2. As the restrictions were intended to run with the land, and touch and concern the land, and were in the chain of title of the burdened and benefitted parties, they were enforceable against PBC, which had actual knowledge of the restrictions.⁵ The first assignment of error is overruled.

Next, there was competent, credible evidence from which the trial court could have concluded that PBC did not have a valid easement permitting it to cross Lot 14. Without the Webers' permission, PBC attempted to construct a driveway across Lot 14 to the parcel it referred to as "Lot 25" despite its acknowledgement that "Lot 25" had never been properly recorded as part of the subdivision, and that there had been no metes-and-bounds description of the lot. The trial court properly determined that neither the original subdivision documents nor any subsequent recording established a valid easement across Lot 14. The trial court also correctly ruled that PBC was not entitled to an easement by necessity or hardship, because other means of access, albeit less convenient ones, existed.⁶ The second assignment of error is without merit.

Finally, the trial court's award of damages to the Smiths was supported by competent, credible evidence and will not be disturbed, as the record reflects that PBC had trespassed on the Smiths' property by knowingly violating recorded subdivision restrictions; had destroyed trees and undergrowth; had changed the grade of the land with heavy earthmoving equipment; and had knowingly withheld information of numerous landslides from the Hamilton County Department of Public Works so that it could obtain permits for the driveway plan. The trial court did not err in awarding both equitable and

⁵ See *Berge v. Van Sweringen Co.* (1966), 6 Ohio St.2d 100, 216 N.E.2d 54; see, also, *Brown v. Huber* (1909), 80 Ohio St. 183, 88 N.E. 322; *Lanier v. Lanier* (1991), 73 Ohio App.3d 694, 598 N.E.2d 150.

⁶ See *Trattar v. Rausch* (1950), 154 Ohio St. 286, 295, 95 N.E.2d 685.

compensatory relief, as provided in the subdivision covenants, and in awarding punitive damages.⁷ The third assignment of error is overruled.

In its final assignment of error, PBC claim that the trial court erred in denying PBC's motion for leave to respond out of time to the Smiths' and the Webers' summary-judgment motions. In April and May 2007, the Smiths and the Webers had moved for summary judgment on PBC's counterclaims for water-drainage issues. PBC did not respond to the motions in any way until November 9, more than six months later and well outside the period to respond provided by Civ.R. 56 and Loc.R. 14(B) of the Court of Common Pleas of Hamilton County.⁸ At a January 28, 2008 hearing, the trial court denied PBC's motion but invited PBC to cite applicable case law or any facts in the record to support its opposition to the summary-judgment motions.

"Civ.R. 6(B)(2) allows for an extension of time to file a late pleading within the trial court's discretion 'upon motion made after the expiration of the specified period * * * where the failure to act was the result of excusable neglect.'"⁹ The decision to extend time under Civ.R. 6 is consigned to the sound discretion of the trial court.¹⁰ Since PBC failed to present any evidence of excusable neglect, we will not disturb the trial court's ruling. The Smiths and the Webers were entitled to judgment as a matter of law on PBC's counterclaims, as the statute of limitations had expired on these claims.¹¹ The fourth assignment of error is overruled.

⁷ See *Bretton Ridge Homeowners Club v. DeAngelis* (1985), 22 Ohio App.3d 65, 488 N.E.2d 925; see, also, R.C. 901.51; *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, 139-140, 490 N.E.2d 615

⁸ See, also, Civ.R. 56(F) (the trial may order a continuance to permit affidavits to be obtained or discovery to be had).

⁹ *Kenwood Office Assocs. v. Maryland Regional Impotence Ctr.* (Dec. 26, 1997), 1st Dist. No. C-970049.

¹⁰ See *id.*

¹¹ See Civ.R. 56(C); see, also, *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852, 840 N.E.2d 226, ¶48-51.

Raising a single assignment, in their cross-appeal numbered C-080864, the Smiths assert that the trial court erred in failing to award the stipulated attorney fees and costs of \$155,343. We disagree. The trial court ruled that its \$120,000 punitive-damages award took these fees “into consideration,” and it declined to make an additional award.

While we cannot say that we would have reached a similar conclusion, a trial court enjoys a degree of flexibility in structuring damage awards in a manner most appropriate to the case under consideration. Since the amount of attorney fees to be awarded lies in the sound discretion of the trial court,¹² and the record reflects a sound reasoning process that would support the court’s decision,¹³ the Smiths’ sole assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 23, 2009

per order of the Court _____.
Presiding Judge

¹² See *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 590 N.E.2d 737; see, also, *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 543 N.E.2d 464.

¹³ See *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.